

No. PD-0053-17

IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/25/2017
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS

APPELLANT

V.

DANIEL VILLEGAS

APPELLEE

**STATE'S MOTION FOR LEAVE TO FILE REPLY TO
APPELLEE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW**

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

COMES NOW, the State of Texas in the above-styled and numbered cause, pursuant to rules 38.3, 38.6(c), and 70.4 of the Texas Rules of Appellate Procedure, and moves for leave to file its reply to Appellee's brief on petition for discretionary review, and would show the Court as follows:

I.

On June 7, 2017, this Court granted the State's petition for discretionary review, from the Eighth Court of Appeals' decision in *State v. Villegas*, 506 S.W.3d 717 (Tex.App.—El Paso 2016, pet. granted), on the following two issues:

- (1) The Eighth Court erred in holding that the trial court did not abuse its discretion in requiring, and placing the burden upon, the State to establish that jail-recorded telephone conversations [Appellee] seeks to exclude pretrial are: (1) relevant to an elemental or evidentiary fact

of consequence to be litigated at trial, (2) not unfairly prejudicial under rule 403, and (3) not inadmissible hearsay, where such determinations necessarily require the ever-changing context of a trial and the party claiming the protection of exclusionary rules of evidence bears the burden of proving his case in a pretrial motion; and

- (2) The Eighth Court misapplied the standard for reviewing relevance determinations where its analysis for determining whether the trial court abused its discretion in *excluding* relevant evidence looked to whether, based on the trial court's personal evaluation of competing or available inferences, it is *reasonable to reject* the State's proffered inferences, when the proper standard looks to whether an appellate court can state with confidence that by no reasonable perception of common experience could it be determined that the proffered inference is one that is *reasonably available* from the evidence.

On July 7, 2017, the State filed its PDR brief. On September 8, 2017, the Appellee, after receiving an extension of time, filed his corrected brief in response to the grounds raised in the State's PDR.

Though not included in the grounds upon which this Court granted discretionary review, the Appellee argues in his brief that the State's notice of appeal, particularly the certification by the elected prosecuting attorney as required by article 44.01(a)(5), was defective and failed to properly invoke appellate jurisdiction. Additionally, the Appellee argues, among other things, that this Court should not consider any of the State's complaints as to the trial court's hearsay determinations because those complaints were either not argued in the

Eighth Court or were not raised in the grounds upon which this Court granted review.

II.

Under rule 70.4 of the Rules of Appellate Procedure, this Court, upon motion by a party, may permit the filing of additional briefs. *See* TEX. R. APP. P. 70.4. Rules 38.3 and 38.6(c) of the Rules of Appellate Procedure permit the appellant to file a reply brief addressing any matter in the appellee's brief within 20 days after the filing of the appellee's brief. *See* TEX. R. APP. P. 38.3, 38.6(c).

III.

The State respectfully requests leave to file its reply to the Appellee's response in order to briefly address why the Appellee's jurisdictional argument is without merit, in the event that this Court addresses the Appellee's jurisdictional argument, and why the Appellee's preservation arguments as to any issue related to the trial court's hearsay determinations are factually incorrect. The State's brief is timely, as it is being filed within 20 days after the Appellee filed his brief on September 8, 2017, and consists of 1,501 words.

PRAYER

WHEREFORE, the State prays that its motion for leave to file its reply to the Appellee's brief on petition for discretionary review be granted.

Respectfully submitted,

JAIME ESPARZA
DISTRICT ATTORNEY
34th JUDICIAL DISTRICT

/s/ Lily Stroud
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ATTORNEYS FOR THE STATE

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on September 22, 2017, a copy of the foregoing motion was sent by email, through an electronic-filing-service provider, to appellee's attorneys: Joe A. Spencer, Jr., joe@joespencerlaw.com; and John P. Mobbs, johnmobbs@gmail.com.

(2) The undersigned also does hereby certify that on September 22, 2017, a copy of the foregoing motion was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Lily Stroud
LILY STROUD